United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-6089

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

8/19

NOTICE OF APPEAL TO,

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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In the Matter of the Claim of :

JAMES CHRISTIAN :

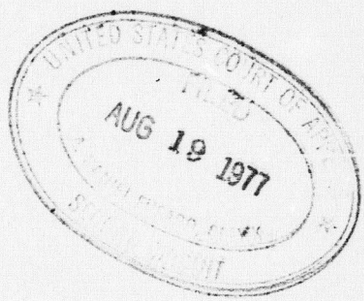
Plaintiff/Appellant x

-vs- :

SECRETARY OF HEALTH, EDUCATION AND WELFARE :

Defendant :

----------x



APPELLANT'S BRIEF AND APPENDIX

JAMES E. CHRISTIAN, PRO-SE
730 Riverside Drive
New York, New York 10031
Tel: (212) 368-6926

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TABLE OF CONTENTS

STATEMENT UNDER RULE. SECTION 216 (1) AND 223 RESPECTIVELY.....	Page 1
ISSUES PRESENTED.....	2
STATEMENT OF FACTS	3 to 5
Medical Records Reasons for reversal	
CONCLUSION.....	6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Claim of	:
JAMES CHRISTIAN	:
Plaintiff/appellant	:
-vs-	:
SECRETARY OF HEALTH, EDUCATION AND WELFARE	:
Defendant/appellee	:

STATEMENT UNDER RULE, OR SECTION 216 (1) AND 233 RESPECTIVELY OF THE SOCIAL SECURITY ACT.

Plaintiff appeals to the United States Court of Appeals for the Second Circuit, from each and each and every part of the decision by Judge Lawrence W. Pierce, United States District Judge of the Southern District of New York. Dated, April 6, 1977.

ISSUES PRESENTED

The general issue before this Court is; whether Plaintiff is entitled to disability and to disability insurance benefits under section 216 (1) and 223 respectively, of the Social Security Act, or if he/she had sustained enough permanent damages whereby he/she would not be able to engage in substantial, gainful activity by reason of mental or medical impairment for a period of 12 months to prevent he/she from working or earning a profitable living.

Section 223 (D)3 further states that in order for Plaintiff to receive benefits, he/she must have a physical or mental impairment which prevents him from working. This is also reiterated in Section 404-1524 (C), of Regulation No. 4 of the Social Security Act.

STATEMENT OF FACTS

This brief is in reply to the decision rendered by Judge Lawrence W. Pierce, denying me, the Plaintiff, disability insurance benefits. The decision of the Judge was based upon a resolution of certain conflicting medical testimonies which he claims was presented in the proceedings. This, I say, is not true; (please check medical records from Columbia-Presbyterian Hospital, New York City). The Judge states in his report that; "It is settled that a decision of the Secretary, denying disability benefits must be sustained by, 'substantial evidence'," Richard v. Perales, 402 U.S. 389 - 401 (1971). I deem this decision of the Judge to be false and prejudiced; as my medical records have already proven. I have all of my medical records on hand in my files, and have presented them each and every time that I have appeared before a Judge ... in addition to all of the briefs that have been given to them.

If Judge Lawrence W. Pierce had taken the time to study my medical records and reading my briefs, instead of basing his decision on the 'careful report (as he states), by Magistrate Benikow; he would have known the facts and rendered a decision in my favor.' I respectfullly call this Court's attention to my brief of February 12, 1977 which is enclosed.

I beg this Court to overturn all of the Administrative Law Judge, Magistrate Benikow's report and the decision by Judge Lawrence W. Pierce; because they were prejudiced of my

case because I was being represented Pro-Se; and have failed to give substantial evidence as to why they disapprove my claim. My medical records and my poor physical and mental condition has to be taken into consideration, because this is all that my case can be judged upon. As the result of my accident in 1971; I have not been able to work, earn a living; I am in constant pain from my spinal operation (the removal of my Coccyx bone, plus, two additional operations. The Judge, lawyers nor doctors know, nor can they tell me how much physical, mental or sexual pains I have suffered each and every day... for six long years. I am still under the doctor's care, and will need medical attention the rest of my life.

Judge Lawrence W. Pierce states,

> Much of plaintiff's opposition to his report was based upon his claim that he has been prejudiced in these proceedings because he had proceeded Pro-Se. The Courts find absolutely no basis in the record for this claim. This is a case where the plaintiff has failed to present evidence sufficient to overturn the administrative findings, not due to lack of presentation...or preparation, but simply, because evidence does not exist. (See Pruitt v. Commercial Carriers, Inc. 395 F. Supp. 1040, 1044)(N.D. Ala. 1974)

In my case, this ruling does not apply; any juror hearing this, (my case), would agree that each and every case is different and should be handled in such a manner. There is always the exception, and in my case, there is. The Judge and everyone reading or listening to my case know that I am right; and that here, certainly, is a case of 'prejudice' existing.

Why not bring this, my case (as I have already begged and requested) to trial, and let a full panel of qualified jurors make a decision. (Brief dated 7/26/76).

Judge Lawrence W. Pierce states in his report

> In taking this appeal from the Administrative determination; Plaintiff undertook a difficult task. The test is not whether there is evidence which could have supported a different result, rather, the general rule which is applicable here, is that the court must sustain the decision of the Secretary if it is supported by substantial evidence on the record as a whole. (Cutler v. Weinberger, 516 F. 2d 1282, 1285 - 2nd Cir. 1975)

This case became of record only after it was tried and proved pro or con, so maybe my case, Dkt. #76 Civ. 0699, tomorrow, will become history...this may have been a difficult task for the Judge to make a decision on, since he was not involved in the 'shooting' accident, and probably has never been shot with a .38 calibre bullet lodging in his spine resulting in physical and mental suffering, pains and being near death. Therefore, unless he has been through what I have for the last 6 years, he wouldn't know. <u>This has not been a difficult task for me</u>, in as much as, <u>I am the one who has suffered; having my coccyx removed and living with constant pain each and every day since I was shot, June 21, 1971</u>.

CONCLUSION

The decision of Judge Lawrence W. Pierce denying my claim for Disability should be reversed, thereby, awarding all, and every benefit due me ... my wife's estate and daughter's, plus, triple damages and interest from June 21, 1971 to this present date, because He, and the Courts have failed to give substantial evidence as to why my claim against HEW should not be approved.

I declare and beg this court, because they failed to have a tape recorder atboth pre-trial hearings dated 7/27/76 and 8/06/76, that the decision of Judge Pierce be overruled in my favor.

Dated: New York, N.Y.
August 15, 1977

Respectively submitted,

James E. Christian

JAMES E. CHRISTIAN,
Pro-Se/appellant
730 Riverside Drive - 2A
New York, N.Y. 10031
Tel: (212) 368-6926

cc: U.S. Court of Appeals
Magistrate Leonard Benikow
Attorney Thomas E. Moseley
Judge Lawrence W. Pierce
New York Daily News

UNITED STATES DISTRICT COURT
STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE
NEW YORK, NEW YORK 10007

JAMES E. CHRISTIAN

Plaintiff

- v -

DKT. #76 Civ. 0699 (LWP)

DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE

Defendant

TO THE HONORABLE LAWRENCE W. PIERCE,
UNITED STATES DISTRICT JUDGE

Dear Sir:

This brief is to reply to the report of U.S. Magistrate Leonard Benikow, dated February 7, 1977, and received by me on February 9, 1977. I disagree, and deem the report to be; unfair and prejudiced. Magistrate Benikow's report is no different in context from the previous decision given by Judge Sidney J. Fenster, and report by Attorney Thomas E. Moseley -- almost the exact copy from the original court transcript. They were both prejudicial of my case because I did appear Pro-se. I further state: Although I am being represented Pro-Se; I do not intend (as has been implied by Judge Fenster and Magistrate Benikow), to disrespect the Bar. Both reports were certainly not relevant to the facts in my case. I quote from Magistrate Benikow's report

> failure to appear with counsel is not necessarily prejudicial to a claimant's case, nor is it a ground for reversal when the Administrative Law Judge assumes his "duty [to] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts-----"

Cutler V. Weinberger, 512 F. 2d 1282, 1285 (2d Cir. 1975). I am

very well aware of the fact that no Judge or Lawyer like to see any case in court that is being presented Pro-Se. Perhaps, it would have been better in 'legal terms', if I had employed an attorney; maybe, speeding up the time of decision. Your Honor, you must also note that this case was first filed over 5-1/2 years ago -- July 20, 1971. I had recently returned from the hospital. My wife, Nettie R. Christian, filed the papers, but then died one year later of cancer, without having ever receiving a penny from the Federal Government to eat, live and support a child who wasstruggling to acquire an education.

At the time, when I filed my claim, I had no thought that this was anything other than an administrative case which would be handled in a fair manner by the Social Security Administration, and that there was no need for an attorney. Later, when the Administrative Law Judge and Magistrate Benikow suggested my securing an attorney; those who I tried to hire refused -- because I had already filed my case Pro-Se. In fact, at our first pre-trial conference -- July 27, 1976, held in the chambers of Magistrate Benikow, along with Attorney Moseley; the both suggested that I hire an attorney because, they didn't think that I had much of a chance of winning the case, unless I did. They also gave me names and addresses of Agencies that they thought would help me. I related to both of them that I had already tried to get help from these same people. However, Magistrate Benikow suggested that I try again, and set August 6, 1976 for a second pre-trial conference. I said to Attorney Moseley that I was afraid to use someone recommended by him, because he/she might not represent me in a proper manner; but, he assured me that they were all honorable people, and had on numerous occasions, defeated him in court. There was no tape recording of this pre-trial conference, as had been when I appeared before the Administrative Law Judge. I requested that we have a tape

of the meeting, but, Magistrate Benikow said that someone had to pay for it. Attorney Mosely said that he had no authorization from the government to pay for such a tape. I presented proof that I had tried to hire an attorney in my brief dated 7/26/76 - 9/17/76. The Magistrate failed to show this in his report.

Your Honor, most of the report coming from Judge Sidney J. Fenster, Magistrate Leonard Benikow and Attorney Thomas E. Moseley, begging that my disability claim be disallowed, was based on the false and prejudiced information coming from a Dr. Walter Besser. I believe that any juror sitting on this case would agree that this is indeed a case of discrimination, and vote to rule against the whole testimony; however, I think that this matter has been covered in my brief dated February 7, 1977 of which I refer you to. Magistrate Benikow said in his report, and I quote: "Plaintiff argues first, that Dr. Besser is an arthritic specialist who, therefore has no expertise regarding Plaintiff's non-arthritic condition, and second, that Dr. Besser failed to give Plaintiff a complete examination." This, your Honor, is not true. I was not concerned about Dr. Besser's qualifications; I did however say, that my condition was not arthritic, but resulted from the gunshot would and the 3 operations which I had, plus the removal of a .38 caliber bullet from my spine, along with part of my coccyx bone, which will never grow back. Dr. Besser was not employed by this Plaintiff, but by the Federal Government, to render a favorable decision for them.

The general issue before this Court is; whether I am entitled to disability and to disability insurance benefits under Section 216 (1) and 223 respectively, of the Social Security Act, or if I had sustained enough permanent damages, whereby I would not be able to engage in substantial, gainful activity by reason

of my mental or medical impairment for a period of 12 months to prevent me from working or earning a profitable living. Section 223(D) (3), further states that in order for me to receive benefits, I must have a physical or mental impairment which prevents me from working. This is also reiterated in Section 404-1524(C), of regulation No. 4 of the Social Security Act. I meet all of these requirements, as my medical records have proved. My mental and physical condition has worsened moreso in the last five years. I respectfully refer your Honor to my Army Discharge and Medical Records -- which I presented to Magistrate Benikow with my brief Dated 7/26/76. He refused to mention those in his report. Because Magistrate Benikow failed to include in his report the above mentioned and, other documents; I respectfully request that you consider these records when making a decision (in my favor), and award me, the benefits due... plus interest for 5-1/2 years; since the Secretary of Health, Education and Welfare, his attorney, Judge Fenster and Magistrate Benikow have failed to give enough concrete proof of why I should be denied.

EXHIBIT 1. Army Discharge and medical records (ref. 2., brief dated 7/26/76.)

EXHIBIT 2. Copy of 1972 Income Tax. (ref. briefs pages 2-3. Detail 7/26/76).*

EXHIBIT 3. Copy of Letter of denial from Harlem Assertionoof Rights (refer, brief dated 7/26/76 p. 1-2.

EXHIBIT 4. Copy of brief, dated 2/7/77.

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*A copy of the income tax return was presented to prove that, in 1972 I was claimed as a dependant on my wife's (Nettie R. Christian) return. This tax return was filed by me, after her death, upon my substantiating same by showing her death certificate. I received the refund for that year.

In reference to the medical report, or contradiction, as quoted by Magistrate in his report;, I am sure that Dr. Zikria can speak for himself as to his qualifications and record as a physician. If in doubt, I would suggest that this court take this matter up with Dr. Zikria, who is a Practicing Physician at Columbia-Presbyterian Hospital, New York City, with office at 160 Ft. Washington Avenue... Telephone 694-5877.

Concerning my work record after my accident -- I did work for a short period of time, but, my mental and physical condition did not allow me to continue -- even though I needed the money for total survival. Selling cars, in some people's opinion, may not require much physical labor, but -- it does require plenty of mental alertness ... ASK ANY SALESMAN!

Judge Fenster, in his transcript, mentioned the words

> plaintiff indicated that he was ready, willing and able to work, as that requirement is a condition imposed by law, which must be met, in order to be entitled to unemployment compensation (TR 10).

The phrase 'ready,willing and able' is much used. However, it had no particular significance in my case. The Appellate Division of the New York State Supreme Court, reversed a decision of the Unemployment Insurance Appeals Board which had denied benefits to me; and awarded me 65 weeks of unemployment insurance. I refer you to the Administrative Law Judge's transcripts (10,25,26, 27, 148, 149 and 105).

Your Honor, in regards to my Health, Mental and Physical Conditions. No one can say that I was not shot in my stomach, when I, as a 'good citizen', came to the aid of one of my elderly neighbors who lived in my building on June 20, 1971 (Father's Day) that I did not have three operations, as a result of this accident. A .38 caliber bullet was removed from my spine and part of my coccyx bone was taken out, and can never be replaced. No Doctor, Judge, or Lawyer can tell me how much physical-mental and sexual pains I have suffered, because of this accident.

You are the Judge in my case. I believe that by the Grace of God, you are a fair and just Judge, who will render a fair decision.

Respectfully submitted,

JAMES E. CHRISTIAN
Plaintiff - Pro-Se

JEC/jt

cc: Magistrate Leonard Benikow

Attorney Thomas E. Moseley

2/17/77.